



Approach to change of control notifications under telecommunications licences

Consultation Document

Channel Islands Competition and Regulatory Authorities

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*Guernsey Competition & Regulatory Authority
Suites B1 & B2, Hirzel Court,
St Peter Port, Guernsey, GY1 2NH
Tel: +44 (0)1481 711120
Web: www.cicra.gg*

*Jersey Competition Regulatory Authority
2nd Floor Salisbury House, 1-9 Union Street,
St Helier, Jersey, JE2 3RF
Tel: +44 (0)1534 514990
Web: www.cicra.je*

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1. Introduction

Parties who operate telecommunications networks or offer telecommunications services in the Channel Islands are, generally speaking, obliged to hold a licence. For the Bailiwick of Guernsey, licences are issued by the Guernsey Competition and Regulatory Authority (**GCRA**) under section 1 of *The Telecommunications (Bailiwick of Guernsey) Law, 2001 (Guernsey Telecoms Law)*. In Jersey, licences are issued by the Jersey Competition Regulatory Authority (**JCRA**) under Article 14 of the *Telecommunications (Jersey) Law 2002 (Jersey Telecoms Law)*.

For the purposes of this document, the GCRA and the JCRA are together referred to as the Channel Islands Competition and Regulatory Authorities, or **CICRA**, and all references in this document to CICRA should therefore be read as references to each of the GCRA and JCRA, unless the context otherwise requires.

Each of the individual¹ telecoms licences issued by CICRA contains a condition requiring the licence holder to notify CICRA when it becomes aware of a proposed or actual change in the identity of the person (or group of persons) that has ultimate control of the licence holder. CICRA must then decide whether to approve or refuse the change of control, or to approve the change subject to changes to conditions in the licence holder's licence.

The concept of "control" is defined in the licence, and focuses on the possession of any power or right to direct the management or policies of the licensee. In cases where a licensee has a parent company that is listed on a stock exchange, it is possible that that company will have ultimate control of the licensee (although it is also possible that major shareholders of that parent company could themselves be regarded as having ultimate control of the subsidiary). Where the licensee's shares are held privately, it is possible that one or more shareholders may be regarded as holding control for the purposes of the licence.

On 3 December 2012, Bahrain Telecommunications Company BSC (**Batelco**) announced that it had signed an agreement to acquire the Monaco & Islands division of Cable & Wireless Communications plc, which includes Cable & Wireless Guernsey Limited (**CWG**) and Cable & Wireless Jersey Limited (**CWJ**). We understand that, subject to the receipt of regulatory consents, the parties hope to complete the acquisition by 31 March 2013. The proposed acquisition by Batelco will therefore

¹ That is, excluding the General Class Licence issued by the JCRA, which applies to certain telecoms activities in Jersey

involve a change of control under the telecoms licences held by CWG and CWJ, and will need to be notified to both the GCRA and JCRA.

There has been no guidance published by either the JCRA or the Office of Utility Regulation (**OUR**), the predecessor to the GCRA, in respect of the interpretation of the change of control provisions. Moreover, while there have been a small number of change of control notifications to the JCRA and OUR in the approximately 10 years since licences were first issued under the Guernsey Telecoms Law and Jersey Telecoms Law, previous decisions of the JCRA and OUR under these provisions either have not been published or have provided no insight into the reasons for the decision.

CICRA anticipates that notifications will be submitted shortly by CWG and CWJ in relation to the change of control arising from the proposed acquisition by Batelco. CICRA recognises that the proposed change of control in this case, and the manner in which CICRA exercises its functions with respect to that change of control, is potentially a matter of significant public interest, especially in Guernsey.

The purpose of this consultation is to seek the views of respondents as to the application of the change of control provisions in telecoms licences in Guernsey and Jersey. To assist parties in considering these issues, CICRA has set out provisional views on how these provisions should be interpreted and the factors that are likely to be relevant to a review of a change of control notification.

2. Structure of the Consultation

This consultation paper is structured as follows:

Section 3:	This section outlines the change of control provisions in telecoms licences, and the statutory duties that apply to CICRA when exercising telecoms regulatory functions.
Section 4:	This section sets out CICRA's provisional views as to the interpretation of the change of control provisions in telecoms licences.
Section 5:	This section sets out proposed next steps in CICRA's review of the likely notifications from CWG and CWJ regarding the change of control arising from the proposed acquisition by Batelco.

Interested parties are invited to submit comments in writing or by email on the matters set out in this paper to one of the following addresses:

GCRA	JCRA
Suites B1 & B2 Hirzel Court St Peter Port Guernsey GY1 2NH Email: info@bicra.gg	2 nd Floor, Salisbury House 1-9 Union Street St Helier Jersey JE2 3RF Email: info@bicra.je

All comments should be clearly marked "*Consultation on Approach to Change of Control Notifications under Telecommunications Licences*" and should arrive by 5.30pm on Thursday, 24 January 2013.

In line with CICRA's consultation policy, the regulators intend to make responses to the consultation available on the CICRA website. Any material that is confidential should be put in a separate annex and clearly marked as such so that it may be kept confidential. CICRA regrets that it may not be in a position to respond individually to the responses to this consultation.

3. Legal Background

Change of control provisions in licences held by telecommunications operators in the Channel Islands

As noted above, telecoms licences in Guernsey and Jersey each contain change of control provisions, in very similar form. As an example, Conditions 2.5 and 2.6 of CWG's fixed telecoms licence provide as follows:

2.5 The Licensee shall notify the [GCRA]:

(a) of any proposed Change of Control of the Licensee forthwith upon the Licensee, or its Chairman, Chief Executive Officer, Chief Operating Officer or any Director becoming aware of the proposed change; and

(b) in any event, on the occurrence of any Change of Control of the Licensee, within thirty days of that event.

2.6 On receipt of notification the [GCRA] may:

(a) approve the proposed change or the change in writing;

(b) disapprove the proposed change or the change in writing, giving reasons; or

(c) approve the proposed change or the change subject to the Licensee accepting a modification of the Licence under Section 8 of the Telecommunications Law,

and, or in addition to any of the above measures, the [GCRA] may issue such directions to the Licensee or invoke any of the sanctions, penalties or remedies in the Law or the Licence as the [GCRA] considers necessary or appropriate.

In taking action under this section, the [GCRA] may have regard to whether or not the [GCRA] would have awarded the Licence to the Licensee had the Change of Control taken effect prior to the award.

The concepts of control and change of control are defined in Condition 2.7 of CWG's fixed licence (and equivalent provisions in other telecoms licences):

In this Condition 2, "Control" shall mean any direct or indirect possession of any power or right that enables a person or group of persons to direct, or cause the general direction of, the management or policies of the Licensee by any means and in any event, a person or group of persons shall be deemed to Control the Licensee if:

(a) he or they exercises or controls the exercise of fifty-one per cent or more of the votes able to be cast at general meetings of the Licensee on all, or substantially all, matters; or

(b) he is or they are able to appoint or remove directors holding a majority of voting rights at board meetings on all, or substantially all matters or is able to appoint or remove a majority of the governing body of the Licensee; or

(c) he or they exercises or controls the exercise of fifty-one per cent or more of the partnership or other ownership interests of the Licensee,

and, in each case, reference to the Licensee shall include any person or group of persons who Controls the Licensee in any of such ways, and "Change of Control" shall mean any change as a result of which any other person or group of persons acquires Control.

Statutory duties of CICRA when exercising regulatory functions in respect of the telecommunications sectors in the Channel Islands

As stated in section 4 below, CICRA's provisional view is that the approach to the assessment of change of control notifications should be informed by the statutory duties imposed on CICRA under the telecoms statutes in Jersey and Guernsey (or, in Guernsey, the general duties imposed on the GCRA in respect of all utility regulation functions).

Section 2 of *The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001* provides as follows:

In exercising their respective functions and powers [under this Law and any Sector Law], the States and [the Guernsey Competition and Regulatory Authority ("the Authority")] shall each have a duty to promote (and, where they conflict, to balance) the following objectives –

(a) to protect the interests of consumers and other users in the Bailiwick in respect of the prices charged for, and the quality, service levels, permanence and variety of, utility services,

(b) to secure, so far as practicable, the provision of utility services that satisfy all reasonable demands for such services within the Bailiwick, whether those services are supplied from, within or to the Bailiwick,

(c) to ensure that utility activities are carried out in such a way as best to serve and contribute to the economic and social development and well-being of the Bailiwick,

(d) to introduce, maintain and promote effective and sustainable competition in the provision of utility services in the Bailiwick, subject to any special or exclusive rights awarded to a licensee by [the Authority] pursuant to States' Directions,

(e) to improve the quality and coverage of utility services and to facilitate the availability of new utility services within the Bailiwick, and

(f) to lessen, where practicable, any adverse impact of utility activities on the environment,

and, in performing the duty imposed by this section, the States and [the Authority] shall have equal regard to the interests of the residents of all islands of the Bailiwick.

In Jersey, the statutory duties imposed on CICRA in respect of its telecoms regulatory functions are set out in Article 7 of the Jersey Telecoms Law:

(1) The Minister and the Authority shall each have a primary duty to perform his, her or its functions under this Law in such manner as each considers is best calculated to ensure that (so far as in his, her or its view is reasonably practicable) such telecommunication services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.

(2) In so far as it is consistent with paragraph (1) to do so, the Minister and the Authority shall each –

(a) perform his, her or its functions under this Law in such manner as each considers is best calculated to protect and further the short-term and long-term interests of users within Jersey of telecommunication services and apparatus, and perform them, wherever each considers it appropriate, by promoting competition among persons engaged in commercial activities connected with telecommunications in Jersey;

(b) perform his, her or its functions under this Law in such manner as each considers is best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;

(c) perform his, her or its functions under this Law in such manner as each considers is best calculated to further the economic interests of Jersey;

(d) perform his, her or its functions under this Law in such manner as each considers is best calculated to impose a minimum of restriction on persons engaged in commercial activities connected with telecommunications in Jersey;

(e) in performing his, her or its functions under this Law, have regard to the need to ensure that persons engaged in commercial activities connected with telecommunications in Jersey have sufficient financial and other resources to conduct those activities; and

(f) in performing his, her or its functions under this Law, have regard to any special needs of persons who are disabled or have limited financial resources or have particular needs.

(3) The Minister and the Authority shall, in considering whether the services referred to in paragraph (1) satisfy the demands referred to in paragraph (1), have regard to –

(a) whether the services are accessible to and affordable by the maximum number of business and domestic users;

(b) whether there is innovation in the services and their provision;

(c) whether the services are of high quality and are reliable;

*(d) whether users are able to express their views about the provision of the services;
and*

(e) any objectives that the States prescribe by Regulations, including, but not limited to –

(i) the provision of a universal service, a social service or any form of cross-subsidized service, and

(ii) the provision of certain services at uniform tariffs or at tariffs that are cross-subsidized by other tariffs.

4. CICRA's provisional views on the substantive approach to change of control reviews

As an initial point, CICRA observes that the change of control provisions in the licences are expressed very broadly. In particular, there is no stipulation as to the substantive test that CICRA should apply when deciding whether to approve or refuse a change of control, or to impose new licence conditions as a condition of approving the change of control.

However, the general statutory duties which apply generally to the exercise by CICRA of telecoms regulatory functions – section 2 of *The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001* and Article 7 of the Jersey Telecoms Law, which are reproduced in section 3 of this consultation document above – will also apply to CICRA's assessment of a change of control notification. Those general duties refer to such factors as the need to protect the interests of consumers and users, and to ensure the provision of services that satisfy all reasonable, or "current and prospective", demand for such services.

The change of control provisions (e.g. Condition 2.6 in CWG's fixed telecoms licence) also state that, in considering a change of control notification, CICRA "may have regard to whether or not it would have awarded the Licence to the Licensee had the Change of Control taken effect prior to the award". While CICRA has discretion as to whether to take this factor into account, CICRA's provisional view is that a consideration of whether the prospective controller would have been granted a licence by CICRA to operate the network or provide the telecoms services is likely to be relevant to an assessment of whether, and on what conditions (if any), to allow a change of control in the licensee. However, in applying this test, CICRA's provisional view is that it may be more appropriate to consider the position as if the award of the licence were to have occurred in the present day, rather than at the time of the actual award (i.e. CWG's case, 2001).

In turn, the consideration of whether a controller would have been granted a licence may be related to the importance of the assets and services that they would have controlled to the overall telecoms market. For example, the impact on consumers and the wider economy of a serious breakdown in CWG's operations (given its role as the operator of the fixed-line network in Guernsey, and by far the largest mobile operator in Guernsey) would arguably be considerably greater than the same occurrence with respect to CWJ, or a smaller operator in either Bailiwick.

Given the statutory duties applying to telecoms regulatory functions, CICRA's provisional view is that the focus of an assessment of a change of control should be

on whether the change to the control of the relevant licensee jeopardises its willingness or ability to provide high quality, sustainable telecoms services, or to comply with its licence conditions or other regulatory requirements. Regulatory risks arising from new control, and therefore relevant factors for the consideration of a change of control notification, could include the following:

- a. The new controller is unwilling or unable to provide sufficient finance to the licensee (including retained earnings) to allow it to undertake capital expenditure:
 - i. to fulfil universal service obligations;
 - ii. to meet increased demand for services;
 - iii. to improve the quality and coverage of telecommunications services, and
 - iv. to facilitate the availability of new telecommunications services;
- b. An assessment of the materiality of risks to the financial and commercial independence of the licensee;
- c. The new controller does not have the operational or managerial expertise to operate the licensee's network;
- d. The new controller jeopardises the financial stability of the licensee, whether by increasing its gearing levels, allowing charges over the licensee's core assets or requiring the licensee to cross-guarantee other group businesses' liabilities; and
- e. The new controller refuses to allow the licensee to take action to comply with licence obligations or directions from the regulator. For example, the new controller's record of regulatory compliance under relevant telecommunications laws in any of the jurisdictions where the new controller holds a telecommunications licence might be relevant to this factor.

Respondents' views are sought on the approach to be taken to an assessment of changes of control of telecoms licensees.

In particular, respondents are asked to indicate:

- (i) what factors they consider to be relevant to an assessment of a change of control under the relevant provisions in the licences; and**
- (ii) whether a commitment to support the respective States' strategic objectives with respect to the telecommunications sector should be**

regarded as a relevant factor for consideration, and if so, the best method by which to secure such a commitment.

5. Next steps

During coming weeks, CICRA expects to receive notifications from CWG and CWJ, pursuant to the relevant provisions in their respective telecoms licences in Guernsey and Jersey, advising of the proposed change of control to Batelco.

In considering these notifications, and deciding whether further information is required from CWG, CWJ and Batelco, CICRA will have regard to the results of this consultation, and, where appropriate, will take account of the views expressed by respondents.

CICRA expect to publish a provisional decision in respect of these notifications in early- to mid-February 2013. CICRA will then allow a brief period for further public comment before publishing a final decision. On present timing, CICRA anticipates that a final decision on the notifications will be published by the end of February 2013.